APPENDIX

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

No. WC80-166-LS-P

PETE HARDIN BROWN and
MOTT'S INC. OF MISSISSIPPI,
Plaintiffs,

v.

FLOWERS INDUSTRIES, INC.,
JERRY KRALIS, AND KRALIS
BROS. FOODS, INC.,
Defendants.

MEMORANDUM ORDER

The court has before it defendants' motion to dismiss for lack of jurisdiction over the person. Rule 12(b)(2), F. R. Civ. P. For the reasons set out below, the court finds that defendants' motion is well taken.

Plaintiffs Pete Harding Brown (Brown) and Mott's Inc. of Mississippi (Mott's) charge defendants with defamation, tortious interference with plaintiffs' business relationships, and violations of the Sherman Act, 15 U.S.C. §1, et seq.

Defendant Flowers Industries, Inc. (Flowers) is a Delaware corporation with its principal place of business in Thomasville, Georgia. Defendant Kralis Bros. Food, Inc. (Kralis Foods) is an Indiana corporation with its principal place of business in Mentone, Indiana. Defendant Jerome Kralis is an adult resident citizen of Mentone, Indiana, and is president of Kralis Foods.

Plaintiffs allege that on or about October 15, 1979, Jerome Kralis, acting as agent for Kralis Foods and Flowers, defamed plaintiffs during a long-distance telephone conversation placed in Mentone, Indiana, to the Office of the United States Attorney in Oxford, Mississippi. Service of process was obtained through the Mississippi Secretary of State pursuant to §13-3-57, Miss. Code Ann. (1972).

Defendants have moved for dismissal on the grounds that the exercise of in personam jurisdiction by this court would violate defendants' right to due process under the Fourteenth Amendment. In support of their motion, defendants have filed affidavits which tend to establish the following facts.

I. FLOWERS INDUSTRIES, INC.

Flowers Industries, Inc., is a holding company, and its relationship to Kralis Foods is that of stockholder. Flowers is not qualified to do business in Mississippi, owns no property here, has no employees or agents here, and maintains no bank accounts or telephone listings here. It appears that Flowers has no contacts at all with Mississippi.

II. KRALIS BROS. FOODS, INC.

Likewise, Kralis Foods is not qualified to do business in Mississippi. Kralis Foods is in the business of buying

and slaughtering spent hens from commercial egg producers for processing and resale to the manufacturers of various food products. Kralis Foods has neither purchased spent hens in Mississippi nor sold its processed product to buyers in Mississippi. Kralis Foods maintains processing plants in Indiana and Illinois, and not in Mississippi. Kralis Foods has no employees or agents in Mississippi, and it owns no property or bank accounts here.

III. JEROME KRALIS

Jerome Kralis has never been a Mississippi resident, and he owns no property or bank accounts here. Jerome Kralis' only visit to Mississippi occurred over eleven years ago when he spent two days of his vacation in Mississippi.

In response to the affidavits filed by defendants, plaintiffs filed identical affidavits on behalf of Brown and Mott's. Plaintiffs' affidavits state that Flowers operates a retail outlet known as Flower's Thrift Shop located at 711 South Gloster Street, Tupelo, Mississippi. Other than this single specific statement of facts, all other statements regarding defendants' activities in Mississippi as set out in plaintiffs' affidavits are mere conclusions, unsupported by specific averments of fact.

The third affidavit of Frederick E. Cooper, filed by defendants in response to plaintiffs' affidavits described above, states that Flowers Thrift Shop, located at 711 South Gloster Street, Tupelo, Mississippi, is not owned by Flowers, but rather is owned by Hardin's Bakery, Inc., of Tuscaloosa, Alabama, a corporation in which Flowers owns stock. Defendants supplied documentary evidence, including an application for privilege license and a privilege tax license receipt, which support Cooper's statement by disclosing that Hardin Bakery was the applicant for the license

granted Flowers Thrift Shop, 711 South Gloster, Tupelo, Mississippi. Thus, plaintiffs have failed to prove that Defendants Flowers, Kralis Foods, and Jerome Kralis have purposefully availed themselves of any benefits, privileges, or protections afforded by the State of Mississippi.

In light of the facts set out above, defendants seek dismissal of this cause on the grounds that there exist no "minimum contacts" between any of the three defendants and Mississippi, the forum state, and, therefore, the exercise of in personam jurisdiction by this court would offend "traditional notions of fair play and substantial justice." We agree.

We assume, without deciding, that the telephone call placed by Jerome Kralis from his office in Mentone, Indiana, to the Office of the United States Attorney in Oxford, Mississippi, was sufficient to come within the ambit of §13-3-57, Miss. Code Ann. (1972), and authorize service of process upon Jerome Kralis and perhaps Kralis Foods based upon commission of a tort in whole or in part in Mississippi. In addition to the requirements of §13-3-57, Miss. Code Ann. (1972), the Due Process Clause of the Fourteenth Amendment requires that the assertion of in personam jurisdiction over a nonresident be supported by certain "minimum contacts" between the nonresident and the forum state. *International Shoe Co. v. Washington*, 326 U.S. 310, 90 L.Ed. 95 (1945). Thus, the Due Process Clause "does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations." *International Shoe Co. v. Washington*, 326 U.S., at 319, 90 L.Ed. 95. The determination of whether these "minimum contacts" exist is not susceptible to decision by some bright line formula, but necessarily re-

quires an evaluation of the facts and circumstances of each case on an individual basis.

Here, the *only* contact between any of the three defendants and the forum state consists of a single long-distance telephone call. Although the cause of action for which suit is brought arose from this converation, the court is unable to conclude that this single contact with Mississippi is sufficient to subject defendants to in personam jurisdiction here. The lack of regular, purposeful activity within Mississippi indicates that defendants have not purposefully availed themselves of the protection and benefits of Mississippi's laws. *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 62 L.Ed.2d 490 (1980).

In light of all the circumstances, the court is of the opinion that requiring defendants to defend an in personam action in Mississippi would offend traditional notions of fair play and substantial justice. Defendants' motion will be granted.

Accordingly, it is

ORDERED:

That defendants' motion to dismiss for lack of in personam jurisdiction is hereby GRANTED.

That this cause is hereby dismissed without prejudice.

SO ORDERED this 27th day of July, 1981.

/s/ L. J. Senter, Jr.
United States District Judge

APPENDIX "B"

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION
OXFORD, MISSISSIPPI

July 29, 1981

NO. WC80-166-LS-P

PETE HARDING BROWN and MOTT'S INC. OF MISSISSIPPI

vs.

FLOWERS INDUSTRIES, INC., JERRY KARALIS and KRALIS BROS. FOODS, INC.

MEMORANDUM

TAKE NOTICE that ORDER granting defendants' motion to dismiss for lack of in personam jurisdiction and dismissing cause without prejudice signed by Judge Senter on July 27, 1981, has been entered in Civil Order Book # 34, pages 279-280.

Norman L. Gillespie, Clerk
By: /s/ Sherry J. Hunter
Sherry J. Hunter,
Deputy Clerk

TO:

Hon. John L. Bailey
Hon. Jackson H. Ables, III

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

NO. WC 80-166-LS-P

PETE HARDIN BROWN and MOTT'S, INC.
OF MISSISSIPPI,
Plaintiffs,

v.

FLOWERS INDUSTRIES, INC., et al.,
Defendants.

ORDER

The court has before it plaintiffs' motion under Rule 59, F. R. Civ. P., to reconsider its order entered July 27, 1981, dismissing this cause for lack of in personam jurisdiction. The court has reviewed the voluminous documentary evidence submitted in support of plaintiffs' motion and in opposition thereto and is of the opinion that plaintiffs, having inadequately dealt with the "due diligence" issue, are not entitled to judgment on their motion. Because the court makes this finding, it need not reach other of defendants' seemingly meritorious objections and plaintiffs' responses thereto.

Accordingly, it is

ORDERED:

That plaintiffs' motion to vacate the court's order of July 27, 1981, is hereby DENIED.

This 19th day of October, 1981.

/s/ L. J. Senter, Jr.
United States District Judge

APPENDIX "D"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 81-4451

PETE HARDING BROWN AND MOTT'S INC.
OF MISSISSIPPI
Appellants

versus

FLOWERS INDUSTRIES, INC., JERRY KRALIS,
AND KRALIS BROS. FOODS, INC.
Appellees

MOTION TO DOCKET THE APPEAL AND TO DISMISS

COME NOW Flowers Industries, Inc., Jerome G. Kralis, and Kralis Bros. Foods, Inc., appellees-movants, by counsel, and move respectfully that this Court docket the appeal and enter its Order dismissing same upon the following ground:

The appeal is not timely because:

(a) The order appealed from, dated July 27, 1981, was entered of record on July 29, 1981.

(b) The appellants' notice of appeal was not filed until October 23, 1981, more than eighty-seven days after entry of the order appealed from, in violation of Rule 4(a), Federal Rules of Appellate Procedure.

(c) The appellants' Rule 59(e) motion filed August 5, 1981, to vacate the order of dismissal (dated July 27, 1981), though perhaps timely, was not properly made under

Fed. R. Civ. P., 7, 8, 9, 11 and 59 and did not terminate the running of the time for filing a notice of appeal, in that:

(1) the appellants failed on at least two separate occasions of opportunity to make the necessary showing to the district court of "due diligence" on their part, a necessary predicate and a condition precedent to seeking the Court's alteration or amendment of the order of July 27, 1981, upon the asserted ground of "newly discovered evidence";

(2) appellants did not state to the district court with particularity the grounds for their motion to vacate, as required by Fed. R. Civ. P., 7(b);

(3) appellants did not proffer any "newly discovered evidence" to substantiate such allegations as their motion vaguely made;

The motion was therefore improper and a nullity to toll the appeal time.

(d) The district court's separate order of October 9, 1981, denying the motion to vacate, is not appealable as such and the notice of appeal is consequently invalid as and to the extent that it complains of such order, in that:

(1) the order of October 9, 1981, is one of a nature from which an appeal does not lie;

(2) though the order is not appealable, neither is that an order reviewable for an abuse of discretion by the district court;

(3) review of any Rule 59 ruling is limited to inquiry into an abuse of discretion by the district court;

(4) the district court had no discretion as a matter of law to entertain the Rule 59(e) motion because it was improperly made, thus there is no discretionary conduct for appellants to complain of or for the Court of Appeals to review.

(e) The appeal is a frivolous attempt to relitigate in this Court the motion to vacate, as the Brief for Appellants undeniably shows.

WHEREFORE, appellants having failed to perfect their appeal within the time required by law and having otherwise failed to take such actions under the Rules as would properly suspend the running of the time within which to file their notice of appeal, the appeal is untimely and this Court has no jurisdiction of it. The appellees pray respectfully that the appeal be docketed and that this Honorable Court order the same dismissed, at the cost of appellants.

Respectfully submitted,

Flowers Industries, Inc., Jerry Kralis and Kralis Bros. Foods, Inc., Appellees

/s/ Jackson H. Ables, III
Of Counsel

Daniel, Coker, Horton and Bell, P.A.
Post Office Box 1084
Jackson, Mississippi 39205
(601) 969-7607

CERTIFICATE

I, Jackson H. Ables, III, of counsel for appellees, do hereby certify that I have this day, via United States Postal Service, postage paid, mailed a true and correct copy of the above and foregoing Motion to Docket the Appeal and to Dismiss to Charles C. Finch, Esq., P. O. Drawer 568, Batesville, Mississippi 38606.

This, the 11th day of January, 1982.

/s/ Jackson H. Ables, III
Jackson H. Ables, III

APPENDIX "E"

(Filed February 10, 1982)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-4451

PETE HARDING BROWN and MOTT'S
INC OF MISSISSIPPI,
Plaintiffs-Appellants,

versus

FLOWERS INDUSTRIES, INC., A Delaware Corporation,
JERRY KRALIS and KRALIS BROTHERS FOOD, INC.,
An Indiana Corporation,
Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Mississippi

Before BROWN, POLITZ and WILLIAMS, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellee's motion to dismiss appeal is denied.

/s/ Illegible

APPENDIX "F"

Pete Harding BROWN and Mott's Inc.
of Mississippi, Plaintiffs-Appellants,

v.

FLOWERS INDUSTRIES, INC., A Delaware Corporation,
Jerry Kralis, and Kralis Brothers Foods, Inc.,
An Indiana Corporation,
Defendants-Appellees.

No. 81-4451.

United States Court of Appeals,
Fifth Circuit.
Sept. 22, 1982.

Suit was dismissed by the United States District Court for the Northern District of Mississippi at Oxford, L.J. Senter, Jr., J., on ground of lack of personal jurisdiction. Plaintiffs appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that where individual nonresident defendant initiated telephone call to Mississippi and allegedly committed intentional tort, and injurious effect of tort, if one was committed, fell in Mississippi, which defendant could easily have foreseen, and where injury was felt entirely by Mississippi resident and Mississippi corporation and where only two witnesses likely to be called as to content of telephone call included such nonresident defendant and a resident of Mississippi, and all witnesses to effect of call resided in Mississippi, due process clause did not preclude personal jurisdiction over nonresident defendants.

Reversed and remanded.

1. Federal Courts (Key) 281

Diversity jurisdiction permits nonresident to seek federal forum to avoid partisanship that state courts might show for their own citizens, but also permits resort to federal court even by residents of forum state to assert claim against nonresident for relief that state court could afford. 28 U.S.C.A. § 1332.

2. Constitutional Law (Key) 305(5)

Federal Courts (Key) 76, 417

In diversity action, federal court enjoys jurisdiction over nonresident defendant to extent permitted by long-arm statute of forum state, but defendant must be amenable to suit under statute, which is requirement that is by law of forum state, and assertion of jurisdiction over defendant must be consistent with due process clause of Fourteenth Amendment, which is requirement controlled by federal law. Fed. Rules Civ. Proc. Rule 4(d)(7), (e), 28 U.S.C.A. § 1332; Miss. Code 1972, § 13-3-57; U.S.C.A. Const. Amend. 14.

3. Courts (Key) 12(2)

The "minimum contacts" test of jurisdiction applies to individuals as well as to corporations, and Mississippi long-arm statute applies to the individual as well as to corporate defendants. Miss. Code 1972, § 13-3-57; U.S.C.A. Const. Amend. 14.

4. Federal Courts (Key) 34

Party invoking jurisdiction of federal court bears burden of establishing jurisdiction over nonresident defendant. Miss. Code 1972, § 13-3-57; 28 U.S.C.A. § 1332.

5. Federal Courts (Key) 34

Where federal district court decided defendants' motion to dismiss, for lack of jurisdiction, solely on basis of

affidavits, plaintiffs were required only to present prima facie case for personal jurisdiction. 28 U.S.C.A. § 1332; Fed. Rules Civ. Proc. Rule 12(b)(2), 28 U.S.C.A.

6. Federal Civil Procedure (Key) 1829

On motion to dismiss for lack of personal jurisdiction, allegations of complaint, except as controverted by defendants' affidavits, must be taken as true. Fed. Rules Civ. Proc. Rule 12(b)(2), 28 U.S.C.A.

7. Federal Courts (Key) 34

On motion to dismiss for lack of personal jurisdiction, conflicts between some facts alleged by plaintiffs and those alleged by defendants in their affidavit would be resolved in plaintiffs' favor for purposes of determining whether prima facie case for in personam jurisdiction had been established. 28 U.S.C.A. § 1332; Miss. Code 1972, § 13-3-57; Fed. Rules Civ. Proc. Rule 12(b)(2), 28 U.S.C.A.

8. Courts (Key) 12(2)

Though personal jurisdiction was predicated on one long-distance telephone call that was alleged to constitute tort committed "in whole or in part" in Mississippi, telephone call, by which it was alleged that a defendant defamed plaintiffs and caused them injury in Mississippi, came within ambit of Mississippi long-arm statute. Miss. Code 1972, § 13-3-57.

9. Courts (Key) 12(2)

Both by its language and by interpretation, Mississippi long-arm statute includes in its reach defendants who commit single tort, and it is not necessary that alleged tortfeasor have been present in state if he causes injury in Mississippi. Miss. Code 1972, § 13-3-57; Fed. Rules Civ. Proc. Rule 12(b)(2), 28 U.S.C.A.

10. Constitutional Law (Key) 305(5)

Courts (Key) 12(2)

Number of contacts with forum state is not by itself determinative as to whether due process clause permits subjecting nonresident defendants to in personam jurisdiction, and what is more significant is whether contacts suggest that nonresident defendant purposefully availed himself of benefits of forum state. Miss. Code 1972, § 13-3-57; U.S.C.A. Const. Amends. 5, 14.

11. Constitutional Law (Key) 305(5)

Courts (Key) 12(2)

Two factors revelant in determining whether court's exercise of personal jurisdiction comports with due process are interest of state in providing forum for the suit and relative conveniences and inconveniences to the parties. Fed. Rules Civ. Proc. Rule 12(b)(2), 28 U.S.C.A.; U.S.C.A. Const. Amend. 14.

12. Constitutional Law (Key) 305(5)

Federal Courts (Key) 76

Where individual nonresident defendant initiated telephone call to Mississippi and allegedly committed intentional tort, and injurious effect of tort, if one was committed, fell in Mississippi, which defendant could easily have foreseen, and where injury was felt entirely by Mississippi resident and Mississippi corporation and where only two witnesses likely to be called as to content of telephone call included such nonresident defendant and a resident of Mississippi, and all witnesses to effect of call resided in Mississippi, due process clause did not preclude personal jurisdiction over nonresident defendants. Fed. Rules Civ. Proc. Rule 12(b)(2), 28 U.S.C.A.; U.S.C.A. Const. Amend. 14; Miss. Code 1972, § 13-3-57.

Appeal from the United States District Court for the Northern District of Mississippi.

Before BROWN, RUBIN and REAVLEY, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

This suit was dismissed by the district court for want of jurisdiction on the basis that due process would be denied by assuming jurisdiction over a nonresident defendant whose sole contact with the forum state was the making of a single defamatory telephone call to a person in that state. Concluding that, under the facts presented, due process permits invocation of jurisdiction over a nonresident who commits in whole or in part a single tort in a state, we reverse.

I

[1] Seeking the benefit of diversity jurisdiction, 28 U.S.C. § 1332 (1976), which permits a resident of the forum state to resort to federal court to assert a claim against a nonresident for relief that a state court afford,[1] Pete Harding Brown, a Mississippi resident, and Mott's Inc. of Mississippi, a Mississippi corporation with its principal place of business in Mississippi, sued Flowers Industries, Inc. ("Flowers"), a Delaware corporation with its principal place of business in Georgia; Kralis Brothers Foods, Inc.

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1. Diversity jurisdiction permits a nonresident to seek a federal forum to avoid the partisanship that state courts might show for their own citizens. *Pease v. Peck*, 59 U.S. (18 How.) 595, 599, 15 L.Ed. 518, 520 (1856); *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 716 n. 6 (5th Cir.), *cert. denied*, 423 U.S. 908, 96 S.Ct. 210, 46 L.Ed.2d 137 (1975). The diversity statute, however, permits resort to federal court even by a resident, who would presumably have nothing to fear from the processes of a state forum when suing a nonresident. *E.g., Smith v. Metropolitan Property & Liab. Ins. Co.*, 629 F.2d 757, 761 n. 7 (2d Cir. 1980).

("Kralis Brothers"), an Indiana corporation with its principal place of business in Indiana; and Jerry Kralis ("Kralis"), an Indiana resident and president of Kralis Brothers. None of the defendants is qualified to do business in Mississippi.

The plaintiffs alleged that the defendants conspired to and did cause them economic and other injuries, and, although relying on diversity jurisdiction, that the defendants also violated the Sherman Antitrust Act, 15 U.S.C. §§ 1-7, and the Robinson-Patman Act, 15 U.S.C. §§ 13-13b, 21a. This was accomplished, they contend, in October 1979 when Kralis made a defamatory telephone call from Indiana to the United States Attorney in Oxford, Mississippi. The plaintiffs allege that the conspiracy and telephone call caused them to lose the chance to obtain a $4 million loan from the Farmers Home Administration.

Service of process was made under the Mississippi longarm statute, Miss. Code Ann. § 13-3-57 (Cum. Supp. 1981).[2] The defendants moved to dismiss the action for

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2. Section 13-3-57 provides:

SERVICE WHEN DEFENDANT IS NONRESIDENT DOING BUSINESS IN STATE—APPOINTMENT OF SECRETARY OF STATE AS AGENT.

Any nonresident person, firm, general or limited partnership, or any foreign or other corporation not qualified under the constitution and laws of this state as to doing business herein, who shall . . . commit a tort in whole or in part in this state against a resident or nonresident of this state . . . shall by such act or acts be deemed to be doing business in Mississippi. Such act or acts shall be deemed equivalent to the appointment by such nonresident of the secretary of the State of Mississippi, or his successor or successors in office, to be the true and lawful attorney or agent of such nonresident upon whom all lawful process may be served in any actions or proceedings accrued or accruing from such act or acts, or arising from or growing out of such . . . tort, or as an incident thereto, by any such nonresident or his, their or its agent, servant or employee.

. . . .

(Continued on following page)

lack of personal jurisdiction. Fed. R. Civ. P. 12(b)(2). This motion was granted by the district court based on its findings that (1) Flowers had "no contacts at all with Mississippi"; (2) Kralis Brothers had neither purchased nor sold products in Mississippi, and had no employees or agents there; and (3) Kralis had no contacts with Mississippi other than the October 1979 telephone call he made to the United States Attorney in Mississippi and a two-day visit to the state more than twelve years ago. The district court reasoned: "We assume, without deciding, that the telephone call placed by Jerome Kralis from his office in Mentone, Indiana, to the Office of the United States Attorney in Oxford, Mississippi, was sufficient to come within the ambit of § 13-3-57, . . . and authorize service of process upon [Kralis] and perhaps [Kralis Brothers] based upon commission of a tort in whole or in part in Mississippi . . . . [T]he court is unable to conclude that this single contact with Mississippi is sufficient to subject defendants to in personam jurisdiction there."

Footnote continued—

> The . . . committing of such tort in this state, shall be deemed to be a signification of such nonresident's agreement that any process against it or its representative which is so served upon the secretary of state shall be of the same legal force and effect as if served on the nonresident at its principal place of business in the state or country where it is incorporated and according to the law of that state or country.
>
> Service of any process herein provided for to be made upon the secretary of state shall be made in like manner and procedure, inclusive of notice of service, and with the same force and effect, as is provided by law for service on nonresident motorist defendants under [Miss. Code Ann.] section 13-3-63, provided, however, that service of process may be had in any county of the state where the defendants, or any of them, may be found.
>
> The provisions of this section shall likewise apply to any person who is a nonresident at the time any action or proceeding is commenced against him even though said person was a resident at the time any action or proceeding accrued against him.

The defendants admit that Kralis made the telephone call although they dispute the plaintiffs' contention that the message was defamatory. They also admit he was acting as an officer of Kralis Brothers but they deny he was an agent or employee of Flowers. They submitted affidavits, not adequately countered, saying that, although Flowers is a holding company that owns stock in Kralis Brothers, Kralis is neither an officer nor an employee of Flowers and was not acting as an agent of Flowers when he made the telephone call.

II

[2, 3] In a diversity action a federal court enjoys jurisdiction over a nonresident defendant to the extent permitted by the long-arm statute of the forum state. *Quasha v. Shale Dev. Corp.*, 667 F.2d 483, 485-86 (5th Cir. 1982); *Moore v. Lindsey*, 662 F.2d 354, 357-58 (5th Cir. 1981); Fed. R. Civ. P. 4(d)(7), (e); 4 C. Wright & A. Miller, Federal Practice and Procedure § 1115, at 470 (1969). Two tests must be met before a state statute can confer jurisdiction over a nonresident defendant. First, the defendant must be amenable to service under the statute,[3] a requirement that is by the law of the forum state.[4] Second, assertion of jurisdiction over the defendant must be consistent with the due process clause of the fourteenth amendment,[5] a requirement that is controlled by federal

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3. *Walker v. Newgent*, 583 F.2d 163, 166 (5th Cir. 1978), *cert. denied*, 441 U.S. 906, 99 S.Ct. 1994, 60 L.Ed.2d 374 (1979); 2 J. Moore & J. Lucas, Moore's Federal Practice ¶ 4.41-1[3], at 4-443 (2d ed. 1982).

4. *Terry v. Raymond Int'l, Inc.*, 658 F.2d 398, 401 (5th Cir. 1981), *cert. denied*, ... U.S. ....., 102 S.Ct. 1975, 72 L.Ed.2d 443 (1982); 4 C. Wright & A. Miller, Federal Practice and Procedure § 1075, at 313, 316 (1969).

5. *Oswalt v. Scripto, Inc.*, 616 F.2d 191, 196 (5th Cir. 1980); *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 489 (5th Cir. 1974); 2 J. Moore & J. Lucas, Moore's Federal Practice ¶ 4.41-1[3], at 4-446 (2d ed. 1982).

law.[6] Due process requires that a nonresident defendant have "certain minimum contacts" with the forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and effective justice,' "[7] or that he perform some act "by which [he] purposefully avails [him]self of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws,"[8] before the forum may extend its long-arm to embrace him.[9]

[4-6] The party invoking the jurisdiction of a federal court bears the burden of establishing the court's jurisdiction over a nonresident defendant. *Southwest Offset, Inc. v. Hudco Publishing Co.*, 622 F.2d 149, 152 (5th Cir. 1980) (per curiam); *Thorington v. Cash*, 494 F.2d 582, 584 n. 4 (5th Cir. 1974). Because the district court decided the defendants' motion solely on the basis of affidavits, the plaintiffs were required only to present a prima facie case for personal jurisdiction. *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981); *Data Disc, Inc. v. Systems Technology Assocs.*, 557 F.2d 1280, 1285 (9th Cir. 1977).[10]

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6. *Terry v. Raymond Int'l, Inc.*, 658 F.2d at 401; *Jetco Elec. Indus., Inc. v. Gardiner*, 473 F.2d 1228, 1232 (5th Cir. 1973); 4 C. Wright & A. Miller, Federal Practice and Procedure § 1075, at 316 (1969).

7. *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95, 101 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 343, 85 L.Ed. 278, 283 (1940)).

8. *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283, 1297 (1958).

9. The "minimum contacts" test applies to individuals as well as to corporations. *Caiagaz v. Calhoun*, 309 F.2d 248, 254-55 (5th Cir. 1962); *San Juan Hotel Corp. v. Lefkowitz*, 277 F.Supp. 28, 30 (D.P.R. 1967); *see Kulko v. Superior Ct.*, 436 U.S. 84, 91-92, 98 S.Ct. 1690, 1696-97, 56 L.Ed.2d 132, 140-141 (1978). Likewise the Mississippi long-arm statute applies to individual as well as to corporate defendants. *Alford v. Whitsel*, 322 F.Supp. 358, 361 (N.D. Miss. 1971).

10. *See Jetco Elec. Indus., Inc. v. Gardiner*, 473 F.2d at 1232.

On a motion to dismiss for lack of personal jurisdiction, the allegations of the complaint, except as controverted by the defendants' affidavits, must be taken as true. *E.g., Black v. Acme Mkts., Inc.*, 564 F.2d 681, 683 n. 3 (5th Cir. 1977).

[7] In this case jurisdiction was predicated on one long-distance telephone call that was alleged to constitute a tort committed "in whole or in part" in Mississippi. The plaintiffs carried their burden of establishing jurisdiction by alleging in their complaint and affidavits facts to support their claim that Kralis defamed them and caused them injury in Mississippi. Although there are conflicts between some of the facts alleged by the plaintiffs and these alleged by the defendants in their affidavits, such conflicts "must be resolved in plaintiff[s'] favor for purposes of determining whether a prima facie case for *in personam* jurisdiction has been established." *United States Ry. Equip. Co. v. Port Huron & Detroit R.R.*, 495 F.2d 1127, 1128 (7th Cir. 1974).

[8, 9] The Mississippi long-arm statute, *supra* note 2, provides: "Any nonresident person . . . who shall . . . commit a tort in whole or in part in this state against a resident . . . of this state . . . shall by such act or acts be deemed to be doing business in Mississippi." The district court assumed, without deciding, that Kralis's telephone call came within the ambit of the Mississippi statute. This assumption was warranted. Both by its language and by interpretation[11] the statute includes in its reach defendants who commit a single tort. An alleged tortfeasor need not have been present in the state. If, as is alleged in this case, he causes injury in Mississippi, he is covered by the statute. *Smith v. Temco, Inc.*, 252 So.2d 212, 216 (Miss.1971). Thus this case resembles other cases in which courts have

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11. *See Alford v. Whitsel*, 322 F.Supp. at 362.

held that conduct like Kralis's is covered by long-arm statutes similar to the Mississippi statute.[12]

[10] The district court erroneously concluded, however, that this one contact was insufficient under the due process clause to subject the defendants to *in personam* jurisdiction. The number of contacts with the forum state is not, by itself, determinative. *Quasha v. Shale Dev. Corp.*, 667 F.2d at 488; *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 495 (5th Cir. 1974).[13] What is more significant is whether the contacts suggest that the nonresident defendant purposefully availed himself of the benefits of the forum state. *Quasha v. Shale Dev. Corp.*, 667 F.2d at 488.[14]

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12. *See, e.g., State ex rel. Advanced Dictating Supply, Inc. v. Dale*, 269 Or. 242, 246-48, 524 P.2d 1404, 1406-07 (1974) (Oregon law) (out-of-state defendant's single defamatory telephone conversation conferred jurisdiction); *Myers v. John Deere Ltd.*, 683 F.2d 270, 271-72 (8th Cir. 1982) (North Dakota law); *National Egg Co. v. Bank Leumi le-Israel B.M.*, 504 F.Supp. 305, 309-12 (N.D. Ga. 1980) (Georgia law); *J.E.M. Corp. v. McClellan*, 462 F.Supp. 1246, 1247 (D. Kan. 1978) (Kansas law); *cf. Murphy v. Erwin-Wasey, Inc.*, 460 F.2d 661, 664 (1st Cir. 1972) ("Where a defendant knowingly sends into a state a false statement, intending that it should there be relied upon to the injury of a resident of that state, he has, for jurisdictional purposes, acted within that state."). *See generally Margoles v. Johns*, 483 F.2d 1212, 1216 (D.C. Cir. 1973) ("Statutes which [like Mississippi's] predicate jurisdiction over a non-resident upon the commission of 'a tort in whole or in part' within the jurisdiction . . . are broadly construed.").

13. *See Benjamin v. Western Boat Bldg. Corp.*, 472 F.2d 723, 726 (5th Cir.) ("very little purposeful activity within a state is necessary to satisfy the minimum contacts requirement"), *cert. denied*, 414 U.S. 830, 94 S.Ct. 60, 38 L.Ed.2d 64 (1973); *cf. In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 235 (6th Cir. 1972) ("A letter or a telephone call may, in a given situation, be as indicative of substantial involvement with the forum state as a personal visit by the defendant or its agents.").

14. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490, 501 (1980) ("[T]he foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there.").

"When a defendant purposefully avails himself of the benefits and protection of the forum's laws—by engaging in activity . . . outside the state that bears reasonably foreseeable consequences in the state—maintenance of the law suit does not offend traditional notions of fair play and substantial justice." *Mississippi Interstate Express, Inc. v. Transpo, Inc.*, 681 F.2d 1003, 1007 (5th Cir. 1982) (citation omitted). In addition to the existence of foreseeable consequences, courts consider " the quantity of contacts, and the source and connection of the cause of action with those contacts" in determining whether a defendant's actions constitute "purposeful availment." *Products Promotions, Inc. v. Cousteau*, 495 F.2d 483, 494 n. 17 (5th Cir. 1974). *Accord Standard Fittings Co. v. Sapang, S.A.*, 625 F.2d 630, 643 (1980), *cert. denied*, 451 U.S. 910, 101 S.Ct. 1981, 68 L.Ed.2d 299 (1981).

[11] Two other factors are also relevant in determining whether the exercise of personal jurisdiction comports with due process. The first is "the interest of the state in providing a forum for the suit." *Austin v. North American Forest Products, Inc.*, 656 F.2d 1076, 1090 (5th Cir. 1981); *Products Promotions, supra*, 495 F.2d at 498. Finally, the "relative conveniences and inconveniences to the parties" are also relevant. *Austin, supra*, 656 F.2d at 1090; *Products Promotions, supra*, 495 F.2d at 495.

[12] These considerations lead us to conclude that the defendants are not denied due process by being subjected to suit in Mississippi. Kralis initiated the telephone call[15] and allegedly committed an intentional tort.[16] The

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15. *Compare Cook Assocs., Inc. v. Colonial Broach & Mach. Co.*, 14 Ill.App.3d 965, 970, 304 N.E.2d 27, 31 (1973) ("[It] was defendant . . . who initiated the business transaction in question by telephoning plaintiff . . . .") *with McBreen v. Beech Aircraft Corp.*, 543 F.2d 26, 31 (7th Cir. 1976) ("The sole contact between

(Continued on following page)

injurious effect of the tort, if one was committed, fell in Mississippi, which the defendant could easily have foreseen. *Rusack v. Harsha*, 470 F.Supp. 285, 291 (M.D. Pa. 1978). The injury was felt entirely by a Mississippi resident and a Mississippi corporation. Forcing them to travel to Indiana to litigate would not advance "[their] interest in obtaining convenient and effective relief." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292, 100 S.Ct. 559, 564, 62 L.Ed.2d 490, 498 (1980). There are only two witnesses likely to be called with regard to the content of the telephone call: one of them, the United States Attorney, resides in Mississippi; the other is, of course, Kralis. All of the witnesses to the effect of the call reside in Mississippi. *See Rusack v. Harsha*, 470 F.Supp. at 291; *cf. Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508, 67 S.Ct. 839, 843, 91 L.Ed. 1055, 1062 (1947) (forum non conveniens).

We intimate no opinion concerning the sufficiency of the evidence against the defendants to survive a motion for summary judgment. That issue, like many others lurking in the case, may be presented to the district court now that its jurisdiction is established.

The judgment of dismissal is REVERSED and the case is REMANDED for further proceedings consistent with this opinion.

Footnote continued—

defendant . . . and the forum in this case consisted of remarks made during a telephone call which was neither solicited nor initiated by the defendant.").

16. "[W]hether an act is intentional or negligent can have a distinct bearing on whether the exercise of jurisdiction thereover is constitutional, for it goes directly to fairness and the degree to which an individual has purposefully availed himself of the privilege of conducting activities within the forum state." *Margoles v. Johns*, 483 F.2d at 1220; *see Bangor Punta Operations, Inc. v. Universal Marine Co.*, 543 F.2d 1107, 1110 & n. 5 (5th Cir. 1976); *Murphy v. Erwin-Wasey, Inc.*, 460 F.2d at 664.

APPENDIX "G"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-4451

PETE HARDING BROWN and MOTT'S
INC OF MISSISSIPPI,
Plaintiffs-Appellants,

versus

FLOWERS INDUSTRIES, INC., A Delaware Corporation,
JERRY KRALIS and KRALIS BROTHERS FOOD,
INC., An Indiana Corporation,
Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Mississippi

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 9/22/82, 5 Cir., 198...., ... F.2d .....).
(October 22, 1982)

Before BROWN, RUBIN and REAVLEY, Circuit Judges.

PER CURIAM:

(√) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local

Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

Entered for the Court:

/s/ Alvin B. Rubin
United States Circuit Judge

CLERK'S NOTE:

See Rule 41 FRAP and Local Rule 17 for Stay of the Mandate

APPENDIX "H"

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

NO. WC80-166-LS-P

PETE HARDIN BROWN AND MOTT'S, INC.,
OF MISSISSIPPI,
Plaintiffs,

v.

FLOWERS INDUSTRIES, INC., et al.,
Defendants.

ORDER

For good cause shown and upon defendants' motion for a stay of proceedings pending consideration of defendants' petition to the Supreme Court for a writ of certiorari directed to the Fifth Circuit Court of Appeals,

IT IS ORDERED:

That this cause be and is hereby STAYED pending the consideration by the United States Supreme Court of defendants' certiorari petition.

This 17th day of December, 1982.

/s/ L. J. Senter, Jr.
United States District Judge